UNITED PLASTICS SDN BHD A

v.

CHAN TENG SONG & ANOR

HIGH COURT MALAYA, JOHOR BAHRU B
HUE SIEW KHENG JC
[CIVIL SUIT NO: (MT-5) 22-833-2005]
13 OCTOBER 2009

TORT: *Conversion - Claim in conversion - Unlawful appropriation of goods - Defendants retrieved and transported two custom-made moulds out of plaintiff's premises without plaintiff's authorisation - Whether plaintiff succeeded in proving its case against defendants* C

This was a claim by the plaintiff against the two defendants, DW1 and DW2, based on the tort of conversion. The plaintiff was the owner of two custom-made moulds ('the moulds') in 2001 that were used in the production of plastic detergent bottles. In 2001, DW1 and DW2 were employed by the plaintiff as the production supervisor and production manager respectively. The main issue requiring determination was whether the defendants had, on or about July/August 2003, in collusion retrieved and transported the moulds out of the plaintiff's factory premises without the plaintiff's authorisation, thereby committing conversion. D E

Held (dismissing the plaintiff's claim with costs): F

(1) On the facts, the plaintiff was incorrect in submitting that DW1's and DW2's written statements, which were admissible, "support or accentuate the plaintiff's case except for minor points". It was clear that the defendants' written statements, far from supporting or accentuating the plaintiff's case, disclosed the reverse. With the security measures that were in place in the plaintiff's factory premises, it was highly improbable that the moulds, which required a forklift to be moved, could be transported out of the plaintiff's premises by a lorry that did not belong to the plaintiff, and without being subjected to security checks. It was also inherently incredible that if DW1 and DW2 had intended to remove the moulds, they would do so openly by instructing not one but three of the plaintiff's staff to help them. There was also no evidence at all that the lorry, with the G H I

A moulds allegedly uploaded onto it, even left the plaintiff's premises. The burden was on the plaintiff to prove the unlawful appropriation by the defendants of the moulds belonging to the plaintiff. On the balance of probabilities, from the evidence adduced, the plaintiff had failed to prove its case against the
B defendants. (paras 34-36)

Case(s) referred to:
Hollins v. Fowler [1875] LR 7 HL 757 ***(refd)***
Lancashire & Yorkshire Ry v. MacNicoll [1919] 88 LJ KB 601 ***(refd)***

C **Legislation referred to:**
Evidence Act 1950, s. 5
Rules of the High Court 1980, O. 18 r. 7(1)

Other source(s) referred to:
Clerk & Lindsell on Torts, 18th edn, p 726
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For the plaintiff - Sathi Anusiah Devi NR Balasingam; M/s Sathi Singam
For the defendants - Wong Cheer Feng; M/s CF Wong & Co

Reported by Suresh Nathan

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JUDGMENT

Hue Siew Kheng JC:

F **[1]** The plaintiff's claim against the two defendants is based on the tort of conversion.

[2] The plaintiff's claim as set out in its synopsis is as follows:

G 1. Plaintiff was/is owner of 2 custom-made moulds ("2 moulds") in 2001, used in production of plastic detergent bottles for client named Higin. In 2001 First and Second defendants were employed as Production Supervisor and Production Manager by Plaintiff.

H 2. The Defendants, on day X in July/Ogos 2003, between 10.30 am and 12 noon, 3-4 months before both Defendants' resignations, in collusion retrieved 2 moulds from the store rack and 2 or 3 days later transported out from Plaintiff's premises without Plaintiff's authorization, thereby committing conversion.

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3. Plaintiff realized loss of 2 moulds only on 06/08/05 after receiving call from client Higin at end of July 2005 for placement of a repeat order for production of plastic detergent bottles and began looking for 2 moulds for purposes of servicing. The loss was not traceable earlier because 2 moulds were in state of disuse since production of plastic detergent bottles for Higin stopped in September 2001.

4. Plaintiff's investigation revealed 3 employees' evidence that on day X in July/August 2003 between 10.30 am and 12 noon, 3-4 months before Defendants' resignations, First and Second Defendants instructed them to retrieve 2 moulds and were seen showing 2 moulds to 2 potential customers and 2 or 3 days later First Defendant instructed one of the workers to load 2 moulds onto an unknown lorry which transported 2 moulds out of Plaintiff's premises.

5. After discovery of loss on 06/08/05 one of Plaintiff's employee gave statement that he saw one of 2 moulds at an engraving shop in Johor Bahru in 2004 when he sent Plaintiff's moulds for engraving to the said shop, evidencing illegal disposal/ parting of 2 molds to third parties by Defendants.

The Issue

[3] The main issue for decision was whether the defendants did retrieve and transport the two moulds in question out of the plaintiff's factory premises without the plaintiff's authorization on or about July/August 2003 thus causing the plaintiff to be deprived of the property/possession of the two moulds and the defendants thereby guilty of conversion.

The Tort Of Conversion

[4] The tort of conversion has been described as a wide tort as it covers the deliberate taking, receipt, purchase, sale, disposal or consumption of another's property. It is not merely an interference with the claimant's possessory interest in his chattels but also an injury to his right or title in them. (see *Clerk & Lindsell on Torts* 18th edn, p. 726).

[5] Thus, in *Lancashire & Yorkshire Ry v. MacNicoll* [1919] 88 LJ KB 601, the court held that:

> Anyone who without authority receives or takes possession of another's goods with the intention of asserting some right or dominion over them, or deals with them in a manner inconsistent with the right of the true owner is *prima facie* guilty of conversion; provided there is an intention on the part of the person so dealing with them to negative the right of the true owner or to assert a right inconsistent therewith.

[6] The essence of conversion lies in the unlawful appropriation of another's chattel, whether for the defendant's own benefit or that of a third party. As enunciated by Lord Chelmsford in *Hollins v. Fowler* [1875] LR 7 HL 757:

> any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

The Plaintiff's Case

[7] To prove its case against the two defendants, the plaintiff called four (4) witnesses. PW1, one Tan Koei Hiong (aka Richard Tan), the Managing Director, gave evidence, *inter alia*, as to the ownership of the two moulds (moulds 302B and 303B) and the production history of the said moulds.

[8] The rest of his evidence wherein he was purportedly informed of the subsequent sighting of the moulds in a third party's premises was based mainly on hearsay and of no probative value as the persons from which he purportedly derived the said information were never called to testify especially one Ng Chee Keong, the tools supervisor of the plaintiff who allegedly saw the said moulds in an engraving mould shop belonging to one Chua Chai Wang.

[9] The three (3) other witnesses who were called were PW2, one Alias bin Masikun (Alias) the technical supervisor of the plaintiff, PW3 Idris bin Athim (Idris) the mould setter and PW4 Mohd. Aris bin Kadimon (Aris) the store assistant.

[10] PW2's evidence was that sometime in July/August 2003, he received a call from the second defendant (Gan) instructing him to retrieve the detergent moulds for cleaning at around 10.30am – 11am. PW2 said when Gan referred to the detergent moulds he knew it referred to moulds 302B and 303B. He did as instructed

although he did say he asked Gan the reason for doing so. According to PW2, Gan told him it was on the instructions of the Managing Director, PW1 as PW1 wanted to sell the moulds and potential buyers wanted to view the moulds.

[11] PW2 testified that shortly after, the first defendant (Chan) came by and asked him (PW2) if Gan had issued the said instructions to him. PW2 said he then instructed PW3, Idris to retrieve the moulds and clean then. PW3 later reported to him that the moulds had been cleaned.

[12] Then, at about 12 noon, PW2 said he saw Chan together with Gan, coming with two (2) Chinese men wearing visitor's pass to Block A, where they were. The two Chinese men took photographs of the moulds. PW2 admitted he had no knowledge of the removal of the moulds from the plaintiff's premises.

[13] PW3, Idris, the mould setter, gave evidence that sometime in 2003 he received instructions from PW2 to service the two moulds as the boss wanted to sell the moulds. Later, he saw the two defendants together with two Chinese men viewing the moulds and taking photographs.

[14] The main witness who allegedly was an eyewitness to the defendant's removing the moulds from the plaintiff's premises was PW4, Aris the store assistant.

[15] His evidence was that one day in 2003, he was instructed by Chan to load the two moulds onto an unidentified lorry. He did so using a forklift. He said he had seen these moulds lying for 2 - 3 days on the factory floor before he received Chan's instructions.

[16] PW4 said he knew they were moulds 302B and 303B from the marker pen markings on the said moulds. He admitted that apart from the markings, he would not be able to identify the moulds at all.

[17] Under cross-examination, he admitted that as he immediately left after loading the moulds onto the lorry, he did not know if the lorry left the plaintiff's premises or what happened to the lorry after that.

[18] When it was expressly put to him that he did not know that the lorry actually left the plaintiff's premises and he did not witness the lorry leaving Block A, from where the moulds were picked up, or the plaintiff's premise, he agreed.

Case For The Defendants

[19] DW1, the first defendant (Chan) in his witness statement, stated that he had resigned from the plaintiff company because of a better offer from another company, Southern Polymer. He also said in his statement that PW1 was angry with him because Southern Polymer was a competiter of the plaintiff company and that not only he and the second defendant left but other personnel as well. This had caused problems to the plaintiff company in its production, particularly as both he and Gan were key personnel, being in charge of production of goods made from moulds.

[20] DW1 stated that he was the first to leave the plaintiff company, followed by the second defendant, then by one Lio Kwang Yew the production technician. After that, one Bob left and finally, John Tan, the marketing manager.

[21] DW1 had also stated that it was not possible for moulds to be taken out from the plaintiff's factory without any records as to its date, time, the vehicle used and the driver because there were CCTV cameras installed at various places at the plaintiff's factory and there was also a security guard house. According to DW1, the CCTV cameras were installed at various places at the factory and at the guard house. Security checks were conducted by the security staff at the guard house where even staff who exit the factory have to open the boot of their cars for inspection. As for visitors, they have to wear a visitor's pass and have their vehicles recorded and checked before entering and leaving.

[22] It was also disclosed that moulds 302B and 303B can be dismantled into parts and it was not necessary for a forklift and a lorry to remove the dismantled parts out of the factory.

[23] DW1 denied instructing anyone in the plaintiff's factory to load moulds 302B and 303B onto a lorry, neither did he bring 2 men into the factory to view the moulds and take photographs.

[24] DW2's, the second defendant, witness statement was in substance, similar to DW1.

[25] DW3, one Lio Kwang Yew, corroborated the evidence of both DW1 and DW2 with regard to the circumstances leading to his resignation from the plaintiff to work for Southern Polymer and the security measures in place in the plaintiff company.

[26] The fourth and last witness for the defendants was one Harun bin Amat, a despatch clerk who testified as to his failed attempts at serving one Chua Chai Wang with a subpoena. "Chua Chai Wang" had been mentioned by PW1 who had said that moulds identical to 302B and 303B had been seen in the premises of Kai Heng Engraving shop where the said Chua was manager.

[27] Learned counsel for the plaintiff chose not to cross-examine all the defendants' witnesses on the ground that the matters stated in the witness statements of DW1, DW2 and DW3 were not pleaded in the statement of defence and that these were assertions and not direct evidence.

Findings Of The Court

[28] As adverted to earlier, at no point in his evidence did PW4 positively state that the lorry onto which the allegedly missing moulds were loaded left the plaintiff's premises. His evidence in examination-in-chief and in cross-examination was that he left immediately after he had loaded the moulds onto the lorry.

[29] PW4 did not impress me as a witness of credibility: I found his evidence especially under cross-examination to be inconsistent and he could not give a satisfactory description of the alleged driver and the lorry which was allegedly used to transport the two allegedly missing moulds.

[30] Even if his testimony that he had loaded the missing moulds onto the lorry is accepted, there is no evidence at all that the moulds ever left the premises or what happened to the moulds after being loaded onto the lorry.

[31] As stated earlier, learned counsel for the plaintiff chose not to cross-examine DW1, DW2 and DW3 on the ground that:

> The Defendants were not cross-examined because the matters stated in the same are matters which were not pleaded and therefore should be rejected on 2 grounds first, by virtue of Section 5 (Exp) of Evidence Act read with rules of civil procedure that parties are bound by their pleadings together with Order 18 rule 19 of RHC which does not accept a bare defence and requires the Defendants to at least state a reasonable defence or in Bahasa Melayu ie, "pembelaan yang munasabah". Even if the Defendants' witness statements are weighed and considered the contents of the three statements support or accentuate the Plaintiff's case except for minor points in which the Defendants are denying in toto the acts pleaded did take place which are preposterous in view of the overwhelming evidence against the both Defendants.

(at p. 19 para 4B of plaintiff's submission).

[32] Section 5 of the Evidence Act 1950 deals with evidence which may be given of facts in issue and relevant facts. The explanation referred to provides:

> This section shall not enable any person to give evidence of a fact which he is disentitled to prove by the law relating to civil procedure.

[33] It is trite law that parties are bound by their pleadings. The plaintiff contends that the contents of the written statement have not been pleaded.

[34] It is also well settled that facts, not evidence, are to be pleaded (see O. 18 r. 7(1)). The contents of the written statements of DW1 and DW2 to my mind comprise evidence by which the fact of denial of the tort of conversion is sought to be proved by the defendants and therefore admissible.

[35] I certainly do not agree with the plaintiff's submission that the written statements "support or accentuate the plaintiff's case except for minor points". It is clear that the written statements, far from supporting or accentuating the plaintiff's case, disclose the reverse. With the security measures that are in place in the plaintiff's factory premises, which PW1 himself as admitted to, it is highly improbable that the two moulds which required a forklift to be moved can be transported out of the plaintiff's premises by a lorry which did not belong to the plaintiff and not subject to security checks. It is also inherently incredible that if DW1 and

DW2 had intended to remove the moulds they would do so openly by instructing not one (1) but three (3) of the plaintiff's staff to help them. There is also no evidence at all that the lorry, with the moulds allegedly uploaded onto it, even left the plaintiff's premises.

[36] As stated earlier, the essence of conversion lies in the unlawful appropriation of another's chattel. The burden is on the plaintiff to prove the unlawful appropriation by the defendants of the two moulds belonging to the plaintiff. On the balance of probabilities, from the evidence adduced, I find that the plaintiff has failed to prove its case against the defendants and the plaintiff's claim was accordingly dismissed with costs.